

that time during the quorum call be charged equally to both sides.

The PRESIDING OFFICER (Mr. BROWN). Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SESSIONS. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mrs. McCASKILL). Without objection, it is so ordered.

EXECUTIVE SESSION

CASS R. SUNSTEIN TO BE ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET—Continued

Mr. SESSIONS. Madam President, the nominee to be Administrator of the Office of Information and Regulatory Affairs, Mr. Cass Sunstein, is before the body. He will be, if confirmed, a part of the White House Office of Management and Budget. He will have a number of responsibilities. It is certainly a very significant position.

This job has the responsibility of renewing all regulations proposed by all the Departments and agencies of the government. The regulations they issue are many. Laws are passed in this Congress, sometimes in haste, leaving the details of execution to the various agencies of our government—the Department of Defense, the Department of Homeland Security, the Department of Agriculture, all the agencies.

They have powers to effectuate the statutes passed by Congress. They set forth the details of how it is done. There are thousands of pages of regulations enacted every year. They are published in the Federal Register. No Senator or Congressman, to my knowledge, has ever sat down and read the Federal Register.

Federal regulations have much the same force as law. Indeed, people can go to jail for violating Federal regulations, and some do go to jail for violations of Federal regulations.

Some of this is, in fact, a product of necessity. For example, you create a park. When does the park open and close? And if people come in and litter, or people come in after hours, they can be punished, arrested, put in jail. Often those regulations and the punishment are set forth through regulation and not through the statute that created the park to begin with.

But it is a matter of real importance. Persons who produce these regulations are nameless and faceless denizens of the bureaucratic deep. They possess enormous power. As a prosecutor, I prosecuted cases. At the DEA, many of the drug regulations enforced by the Drug Enforcement Administration are based on regulations they pass, not what was actually required by the Con-

gress of the United States. Major policy decisions are often set forth in that fashion, including environmental regulations, health care regulations, and reimbursement rules and hospital requirements. Financial institutions can be done through regulations and controlled through them. Truly, there is a concern about the disconnect between the democratic accountability we are known for in our country and this process of administrative regulations.

During President Reagan's time, I believe, Congress passed a law that created this position: the Administrator for the Office of Information and Regulatory Affairs, the idea being to have another unelected bureaucrat—and that is what this one is—but to be a central clearinghouse for all the proposed regulations and to question the lawfulness or the necessity or the cost of these thousands of regulations that get promulgated on a yearly basis.

It is an important position that can protect and at least somewhat ensure that our constitutional liberties are not being eroded.

Enter Mr. Sunstein. He is a most likable person, a national intellectual, always interesting, sometimes taking positions that those on the left—of which he clearly is a part—disagree. Indisputably, he is a man of the left. However, he has taken, over the years, quite a number of positions, some of which are pretty shocking. So I think he is not normally the kind of person you would appoint to this kind of green-eyeshades position—somebody who would be sitting down on a daily basis reading the regulations and studying them and researching them—to be a free spirit, as our nominee is. So I have some concerns about it.

Over the course of his career in academia, Professor Sunstein has clearly advocated a number of positions that are outside—well outside—the American mainstream. While much of the criticism of his nomination rightly has focused on his animal rights advocacy, where he, in effect, and plainly said he thought animals should be able to have lawyers appointed to defend their interests—and these are controversial matters—but he has other legal writings that are controversial also and do not just deal with the question of animal rights. I would like to highlight just a few of those positions.

In his 2008 book titled “Nudge: Improving Decisions About Health, Wealth and Happiness,” Professor Sunstein advocates an approach to the law based on economic and behavioral principles which he dubs “libertarian paternalism.”

Under Professor Sunstein's theory, the government can take steps to “nudge” individuals toward making what he would say are better decisions, and at least what the government considers to be more desirable social behavior.

Professor Sunstein argues that the government can achieve these goals while not being actively, or at least ob-

viously, coercive. His theory operates on the assumption that the average person is “lazy, busy, impulsive, inert, irrational, and highly susceptible to predictable biases and errors.”

So the government needs to be a little paternalistic, he suggests, and take care of them and issue regulations and pass laws that keep them from doing things that some bureaucrat or some Congressman thinks is not socially desirable.

As Professor Sunstein argues:

For too long, the United States has been trapped in a debate between the *laissez-faire* types who believe markets will solve all our problems and the command-and-control types who believe that if there is a market failure then you need a mandate. The *laissez-faire* types are right that . . . government can blunder, so opt-outs are important. The mandate types are right that people are fallible, and they make mistakes, and sometimes people who are specialists know better and can steer people in directions that will make their lives better.

That is what he has said.

Presumably, in Professor Sunstein's view, the “specialists” who “know better” than ordinary Americans are government bureaucrats. He seems to believe Americans are “lazy” and “inert,” and I think this is not a healthy view. So I question whether anyone who thinks Americans are fundamentally lazy can perform his role as the gatekeeper of government regulation in the Obama administration.

Professor Sunstein's approach is consistent with much of what we have seen from this administration, I have to say, which seems to believe that government control of health care, the financial markets, and the business community generally is preferable to free market policies. Americans are not comfortable with this.

I have been out having townhall meetings. I know they are not comfortable with it. According to recent polling, 52 percent of voters worry that the government will do too much to “help” the economy.

That is from a Rasmussen poll of June 2, 2009. Fifty-nine percent of voters believe the financial bailouts were a “bad idea.” The masters of the universe thought it was going to be great. We spent \$800 billion, the largest expenditure in the history of the American Republic, and every penny of that is going to the national debt because we were already in debt. We borrowed every penny of it. We have had very low stimulative effect from that. The American people are right about that.

Only 31 percent of voters believe this stimulus bill has helped the economy. And we do not need a poll to tell us how uncomfortable the American people are with the President's effort to overhaul health care.

So the American people ought to understand if we confirm Professor Sunstein, he will be the chief architect and gatekeeper over all of the regulations that this administration will be attempting to implement in a myriad of areas—not just health care and financial markets but agriculture, the

environment, energy, a host of areas that impact the people of our country. I think his views make him a person who should not be in this position.

Let's take another issue that is important to a lot of people. Professor Sunstein has taken an extremely aggressive position with respect to abortion. Under his views, laws restricting access to abortion "co-opt women's bodies for the protection of fetuses."

According to Professor Sunstein, such laws "selectively turn women's reproductive capacities into something for the use and control of others." In his view, "abortion should be seen not as murder of the fetus but instead as a refusal to continue to permit one's body to be used to provide assistance to it." Failure to accept this view, he wrote, is simply a product of one's accepting the preexisting baseline of women as child-bearers. The role of involuntary child-bearer, he argued, results "only from government interference limiting the capacity to choose not to bear a child involuntarily."

Well, I think this is a disturbingly far-reaching and excessive view on this important issue of abortion. It fails to recognize in any way the moral aspect of this debate which has divided America since the Supreme Court decision in *Roe v. Wade*. I think his view mocks those who have a different view based on their deep beliefs and analysis of what that life is that is within the mother.

What about the question of affirmative action? We talked a good bit about that during the Judge Sotomayor hearings in the firefighters case. Professor Sunstein has taken an extreme view, I think, in these issues, arguing that affirmative action programs "should generally not be thought to raise a serious constitutional issue." In his view, "the current distribution of benefits and burdens along racial lines is an outgrowth of a long history of discrimination."

Professor Sunstein has returned to this theme repeatedly. In 1992, in an article, he again argued that existing law depends heavily on "existing distributions of wealth and power." Specifically, he argued that the conservative objection to affirmative action programs—namely, that discrimination is discrimination regardless of the pretext—simply takes as a given existing distributions of wealth and power without considering the historical and legal context that led to those distributions.

Professor Sunstein further argues that the constitutional text imposes no clear ban on affirmative action. Well, the Constitution says everybody should be given due process and equal protection of the laws. When you advantage one person because of their race, you disadvantage another person because of their race. It is not a zero sum game.

He goes on to say that there is "no clear moral argument [that] requires courts to treat affirmative action policies with great skepticism."

In 1997, after the Fifth Circuit struck down the University of Texas School of

Law's affirmative action admissions policy as a violation of the equal protection clause of the U.S. Constitution, Professor Sunstein dubbed the Fifth Circuit's decision in *Hopwood* as hubristic and compared it to *Dred Scott v. Sanford*, stating:

[A] court opinion outlawing affirmative action is closely analogous to *Dred Scott*, and defective—abusive, overreaching—for the same reason: It would be an amazing act of hubris.

As we discussed in some detail during the recent nomination of Judge Sotomayor, the Supreme Court's jurisprudence in this area requires any government discrimination—and that is what happens when you have a quota—that any discrimination by the government be subject to strict scrutiny of the courts because on its face it seems to be unfair. We know that as a result of long-term systemic discrimination, particularly against African Americans, courts have found that to remedy that, it is perfectly all right to remedy this lack of equal protection by fixing it and imposing certain remedies that favor groups that have been discriminated against as a remedial act. But when you pass the remedial stage and you are in a stage of objectivity, as we have in most of America today, then if you favor one group over another, the Supreme Court says that has to be looked at under strict scrutiny. You have to be careful you are not overreaching here. It seems Mr. Sunstein has no sympathy for that whatsoever. And that is the *Adarand* decision basically by the Supreme Court. He seems to hold the view that such discrimination is not only permissible but that the strict scrutiny standard announced in *Adarand* and other Supreme Court cases is totally inappropriate. I question whether someone who holds these views should be put in a position to make the kinds of decisions he will be making as the regulations czar, some might say.

With regard to the nominations of Federal judges, he has taken some positions that I think have been unhealthy for the country.

Back in 2001, the *New York Times* had an article. It was a very significant little article. It wasn't a big article, but it was very important and significant. It reported that Professor Sunstein, along with Professor Tribe and Marcia Greenburger—lawyers all—attended a private retreat where they lectured Democratic Senators on how to block Republican judicial nominees by "changing the ground rules." The title of the article by Neil A. Lewis was "Democrats Ready for a Judicial Fight." And, indeed, they did. I think this Senate has been less healthy as a result of what they accomplished through the filibuster of judges on a routine basis.

Again, according to the *New York Times*, it was reported that they argued at the meeting that:

It was important for the Senate to change the ground rules and there was no obligation

to confirm someone just because they were scholarly or erudite.

A month later, Professors Sunstein and Tribe, along with Ms. Greenburger, were invited to testify before the Judiciary Subcommittee on Administrative Oversight and the Courts in a hearing titled "Should Ideology Matter? Judicial Nominations 2001." They argued at that hearing that political ideology of nominees is a legitimate issue for Members to consider in their record. I think that has been an unhealthy thing, and we have had a number of debates and hearings on it since.

I believe my Democratic colleagues, to their credit, have backed away from that. In other words, it is all right to dig deeply into a nominee's judicial philosophy and whether they are committed to the law and how they envision their process of interpreting the Constitution. But it is quite another to say that, if you have this political ideology or these views, that you can no longer be chosen to be someone who can decide cases fairly, because most judges have some personal views and they have to decide cases every day, setting aside those personal views.

At the hearing, I thought he made an odd statement. He said that the current Supreme Court "has no left at all." He believes that the people who have been generally reported to be activists or liberals were centrists and that presumably, I guess, the bad folks on the Court were the judges who believe in enforcing the law as written regardless of their personal views. Indeed, he testified at that hearing that he "can't think of a single nominee by President Clinton to the lower Federal courts who genuinely counts as a liberal."

Well, Mr. Sunstein has a lot of ability. He has taken some positions on animal rights that are clearly shocking and that are troubling in light of how important it is to have a person in this position who has good judgment to render good decisions about the regulations that would impact every American in this country.

I don't have anything personal against this nominee. He has many friends. He is a prolific writer and commentator. But I think his views are outside the mainstream, and I will be voting against the nomination.

I thank the Chair and yield the floor.
The PRESIDING OFFICER (Mr. FRANKEN). The Senator from Illinois is recognized.

Mr. BURRIS. Mr. President, I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mr. BURRIS are printed in today's *RECORD* under "Remembering Senator Edward M. Kennedy.")

The PRESIDING OFFICER. The Senator from Hawaii is recognized.

Mr. AKAKA. Mr. President, I ask unanimous consent that the previous order with respect to the vote on confirmation of the nomination of Cass

Sunstein be modified to provide that the vote on confirmation occur at 3:40 p.m., with the other provisions remaining in order.

The PRESIDING OFFICER. Without objection, it is so ordered.

Under the previous order, the question is, will the Senate advise and consent to the nomination of Cass R. Sunstein, of Massachusetts, to be Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget?

The Senator from Minnesota is recognized.

Ms. KLOBUCHAR. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. BOXER) and the Senator from West Virginia (Mr. BYRD) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 57, nays 40, as follows:

[Rollcall Vote No. 274 Ex.]

YEAS—57

Akaka	Franken	Merkley
Baucus	Gillibrand	Mikulski
Bayh	Hagan	Murray
Bennet	Harkin	Nelson (FL)
Bennett	Hatch	Reed
Bingaman	Inouye	Reid
Brown	Johnson	Rockefeller
Burris	Kaufman	Schumer
Cantwell	Kerry	Shaheen
Cardin	Klobuchar	Snowe
Carper	Kohl	Specter
Casey	Landrieu	Stabenow
Collins	Lautenberg	Tester
Conrad	Leahy	Udall (CO)
Dodd	Levin	Udall (NM)
Dorgan	Lieberman	Voinovich
Durbin	Lugar	Warner
Feingold	McCaskey	Whitehouse
Feinstein	Menendez	Wyden

NAYS—40

Alexander	Ensign	Murkowski
Barrasso	Enzi	Nelson (NE)
Begich	Graham	Pryor
Bond	Grassley	Risch
Brownback	Gregg	Roberts
Bunning	Hutchison	Sanders
Burr	Inhofe	Sessions
Chambliss	Isakson	Shelby
Coburn	Johanns	Thune
Cochran	Kyl	Vitter
Corker	LeMieux	Webb
Cornyn	Lincoln	Wicker
Crapo	McCain	
DeMint	McConnell	

NOT VOTING—2

Boxer Byrd

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is considered made and laid upon the table.

The President shall be immediately notified of the Senate's action.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate shall resume legislative session.

TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES APPROPRIATIONS ACT, 2010

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to consideration of H.R. 3288, which the clerk will report by title.

The assistant legislative clerk read as follows:

A bill (H.R. 3288) making appropriations for the Departments of Transportation, and Housing and Urban Development, and related agencies for the fiscal year ending September 30, 2010, and for other purposes.

The Senate proceeded to consider the bill, which had been reported from the Committee on Appropriations, with an amendment to strike all after the enacting clause and insert in lieu thereof the following:

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of Transportation and Housing and Urban Development, and related agencies for the fiscal year ending September 30, 2010, and for other purposes, namely:

TITLE I

DEPARTMENT OF TRANSPORTATION

OFFICE OF THE SECRETARY

SALARIES AND EXPENSES

For necessary expenses of the Office of the Secretary, \$100,975,000, of which not to exceed \$2,631,000 shall be available for the immediate Office of the Secretary; not to exceed \$986,000 shall be available for the immediate Office of the Deputy Secretary; not to exceed \$20,359,000 shall be available for the Office of the General Counsel; not to exceed \$10,107,000 shall be available for the Office of the Under Secretary of Transportation for Policy; not to exceed \$10,559,000 shall be available for the Office of the Assistant Secretary for Budget and Programs; not to exceed \$2,400,000 shall be available for the Office of the Assistant Secretary for Governmental Affairs; not to exceed \$26,265,000 shall be available for the Office of the Assistant Secretary for Administration; not to exceed \$2,123,000 shall be available for the Office of Public Affairs; not to exceed \$1,711,000 shall be available for the Office of the Executive Secretariat; not to exceed \$1,499,000 shall be available for the Office of Small and Disadvantaged Business Utilization; not to exceed \$9,072,000 for the Office of Intelligence, Security, and Emergency Response; and not to exceed \$13,263,000 shall be available for the Office of the Chief Information Officer: Provided, That the Secretary of Transportation is authorized to transfer funds appropriated for any office of the Office of the Secretary to any other office of the Office of the Secretary: Provided further, That no appropriation for any office shall be increased or decreased by more than 5 percent by all such transfers: Provided further, That notice of any change in funding greater than 5 percent shall be submitted for approval to the House and Senate Committees on Appropriations: Provided further, That not to exceed \$60,000 shall be for allocation within the Department for official reception and representation expenses as the Secretary may determine: Provided further, That notwithstanding any other provision of law, excluding fees authorized in Public Law 107-71, there may be credited to this appropriation up to \$2,500,000 in funds received in user fees: Provided further, That none of the funds provided in this Act shall be available for the position of Assistant Secretary for Public Affairs.

NATIONAL INFRASTRUCTURE INVESTMENTS

For capital investments in surface transportation infrastructure, \$1,100,000,000, to remain

available through September 30, 2012: Provided, That the Secretary of Transportation shall distribute funds provided under this heading as discretionary grants to be awarded to a State, local government, transit agency, or a collaboration among such entities on a competitive basis for projects that will have a significant impact on the Nation, a metropolitan area, or a region: Provided further, That projects eligible for funding provided under this heading shall include, but not be limited to, highway or bridge projects eligible under title 23, United States Code; public transportation projects eligible under chapter 53 of title 49, United States Code; passenger and freight rail transportation projects; and port infrastructure investments: Provided further, That in distributing funds provided under this heading, the Secretary shall take such measures so as to ensure an equitable geographic distribution of funds, an appropriate balance in addressing the needs of urban and rural communities, and the investment in a variety of transportation modes: Provided further, That a grant funded under this heading shall be not less than \$10,000,000 and not greater than \$300,000,000: Provided further, That not more than 25 percent of the funds made available under this heading may be awarded to projects in a single State: Provided further, That the Federal share of the costs for which an expenditure is made under this heading shall be, at the option of the recipient, up to 80 percent: Provided further, That the Secretary shall give priority to projects that require a contribution of Federal funds in order to complete an overall financing package: Provided further, That not less than \$250,000,000 of the funds provided under this heading shall be for projects located in rural communities: Provided further, That for projects located in rural communities, the minimum grant size shall be \$1,000,000 and the Secretary may increase the Federal share of costs above 80 percent: Provided further, That projects conducted using funds provided under this heading must comply with the requirements of subchapter IV of chapter 31 of title 40, United States Code: Provided further, That the Secretary shall publish criteria on which to base the competition for any grants awarded under this heading no sooner than 60 days after enactment of this Act, require applications for funding provided under this heading to be submitted so sooner than 120 days after the publication of such criteria, and announce all projects selected to be funded from funds provided under this heading no sooner than September 15, 2010: Provided further, That the Secretary may retain up to \$25,000,000 of the funds provided under this heading, and may transfer portions of those funds to the Administrators of the Federal Highway Administration, the Federal Transit Administration, the Federal Railroad Administration and the Federal Maritime Administration, to fund the award and oversight of grants made under this heading.

FINANCIAL MANAGEMENT CAPITAL

For necessary expenses for upgrading and enhancing the Department of Transportation's financial systems and re-engineering business processes, \$5,000,000, to remain available until expended.

OFFICE OF CIVIL RIGHTS

For necessary expenses of the Office of Civil Rights, \$9,667,000.

TRANSPORTATION PLANNING, RESEARCH, AND DEVELOPMENT

For necessary expenses for conducting transportation planning, research, systems development, development activities, and making grants, to remain available until expended, \$8,233,000.

WORKING CAPITAL FUND

Necessary expenses for operating costs and capital outlays of the Working Capital Fund, not to exceed \$147,500,000, shall be paid from appropriations made available to the Department of Transportation: Provided, That such services